UNITED STATES DISTRICT COURT
DISTRICT OF COLUMBIA

SAGE INTACCT, INC., 300 Park Avenue, Suite 1400 San Jose, California 95110 Plaintiff, v. KENNETH T. CUCCINELLI II, ACTING DIRECTOR, UNITED STATES CITIZENSHIP AND IMMIGRATION SERVICE, 20 Massachusetts Avenue, NW, Washington, D.C. 20529 Defendant.	C/A No.: 1:19-cv-2951

COMPLAINT

1. This is an action brought pursuant the Administrative Procedure Act, 5 U.S.C. § 702, et. seq., seeking to hold unlawful and set aside the decision of the California Service Center (CSC) Director of the United States Citizenship and Immigration Services (USCIS) in File No. WAC1921750849, denying Plaintiff Sage Intacct, Inc.'s Form I-129, Petition for Nonimmigrant Worker, filed upon behalf of Venkatesan Chandran. Defendant's decision is unlawful and must be set aside under the standards of 5 U.S.C. § 706.

2. This case illustrates why Congress created the Administrative Procedure Act ("APA"), 5 U.S.C. § 551 et seq., and the bureaucratic monster that can be spawned by neglecting its requirements.

3. Congress authorized United States employers to hire and employ temporary ("nonimmigrant") foreign professionals in "specialty occupations" ("H-1B" visa). 8 U.S.C. §§ 1101(a)(15)(H)((i)(b), 1182(n), and (1184(i).

4. To qualify for an H-1B specialty occupation, the employer must show that the position requires the "theoretical and practical application of a body of highly specialized knowledge" and "attainment of a bachelor's degree or higher degree in the specific specialty (or its equivalent) as a minimum for entry into the occupation in the United States." 8 U.S.C. § 1184(i)(1)(A), and (B). The statute continues on to explain that an actual degree is not required, but experience equivalent to a degree will suffice. 8 U.S.C. §§ 1184(i)(1)(B) and (2)(C).

5. Congress delegated authority to make regulations concerning this category to the Department of Labor ("DOL") and the Department of Homeland Security ("DHS"), United States Citizenship and Immigration Service ("USCIS"). Id. at §§ 1103, 1182(n), and 1184(a). The qualifying degree requirement in Section 1184(i)(1)(B) was determined to lack clarity, and Defendant's predecessor the Immigration and Naturalization Service ("INS") filled in the gaps with 8 C.F.R. § 214.2(h)(4)(iii)(A). While Defendant USCIS has binding regulations defining what "qualif[ies] as a specialty occupation," the agency does not follow those rules. Id.

6. With no prior publication, and no explanation in its decisions, Defendant has undertaken a sea change in its approach to specialty occupations. At present, it is impossible for a member of industry or even attorneys to read the statute, regulations, forms, and instructions to the forms, and understand what Defendant actually requires for approval of an H-1B petition. Moreover, Defendant's written decisions provide neither law, nor an explanation of the basis of denial that provides clarity for how future petitions could comply with these unwritten rules.

PARTIES

7. Plaintiff Sage Intacct, Inc., was established in 1999, and is headquartered at 300 Park Avenue in San Jose, California. Plaintiff builds and develops computer systems and analytical tools for its clients. Plaintiff description of the business from the petition memo. Plaintiff has been harmed by Defendant's unlawful denial of its petition for immigration benefits on behalf of Venkatesan Chandran ("Beneficiary").

8. Defendant is United States Citizenship and Immigration Service ("USCIS" or "Defendant"). USCIS is a component of the Department of Homeland Security ("DHS"). DHS is an executive agency of the United States, and an "agency" within the meaning of the APA, 5 U.S.C. § 551(1). DHS assumed responsibility from the Immigration and Nationality Service ("INS" or "Defendant") on March 1, 2003, to administer responsibilities under the Immigration and Nationality Act (INA) and in particular to fulfill its duties to adjudicate employment-based immigrant and nonimmigrant visa petitions.

JURISDICTION AND VENUE

9. This Court has subject matter jurisdiction over this action pursuant to 28 U.S.C. § 1331, as this is a civil action arising under the Constitution, laws, or treaties of the United States. This Court also has subject matter jurisdiction pursuant to 28 U.S.C. § 2201, as this is a civil action seeking, in addition to other remedies, a declaratory judgment.

10. The United States has waived sovereign immunity, allowing this Court to review challenges to final agency actions and unlawfully withheld action under Administrative Procedure Act ("APA"). 5 U.S.C. § 702. The standards of review for these actions are found in 5 U.S.C. § 706.

11. Plaintiff has a legally protected interest to ensure a decision by the USCIS complies with the requirement of the Immigration and Nationality Act, 8 U.S.C. § 1101 et seq., and the standards of the APA at 5 U.S.C. § 706(2). Plaintiff has been impacted by Defendant's decision and has standing because it is in the zone-of-interest. Match-E-Be-Nash-She-Wish Band of Pottawatomi Indians v. Patchak, 567 U.S. 209 (2012). Defendant's violation of the law has created a concrete injury in that Plaintiff, can no longer hire and employ a valuable employee, Venkatesan Chandran. This harm was caused by Defendant's unlawful denial of the extension of immigration petition WAC1921750849. A favorable decision from this court will result in Defendant's decision being overturned, the approval of the extension of petition WAC1921750849 and Plaintiff will be allowed to hire and employ the beneficiary. Consequently, Plaintiff has standing to complain of this action. Lujan v. Defs. of Wildlife, 504 U.S. 555, 560-61 (1992).

12. Venue is proper in this district pursuant to 28 U.S.C. § 1391(e)(1), because Defendant is headquartered in this district.

FACTS

13. On June 7, 2019, Defendant accepted Plaintiff's Form I-129, Petition for Nonimmigrant Worker, and supporting documentation in support of an H-1B visa petition on behalf of Venkatesan Chandran (Beneficiary). Plaintiff sought to hire and employ the beneficiary as a Senior Software Engineer Lead. The Beneficiary has a Bachelor of Engineering degree in Mechanical Engineering from the University of Madras.

14. Plaintiff provided all regulatorily required documentation with the petition.

15. On September 18, 2019, Defendant denied the petition because it did not believe the position was so complex that it required a bachelor's or higher degree.

LEGAL BACKGROUND

A. ADMINISTRATIVE PROCEDURE ACT

16. Federal agencies must comply with the Administrative Procedure Act ("APA") when crafting and enforcing decisions, regulations, legislative rules. 5 U.S.C. § 553.

17. Courts have authority to review and invalidate final agency actions that are not in accordance with the law, exceed agency authority, lack substantial evidence, or are arbitrary and capricious. 5 U.S.C. § 706.

B. IMMIGRATION AND NATIONALITY ACT

18. All "aliens" are presumptively inadmissible to the United States, and apply for an exception to this general prohibition by filing petitions and applications with Defendant. 8 U.S.C. § 1182, and 5 U.S.C. § 551(11) and (13) (categorizing exceptions and exemptions from statutory prohibitions as "relief").

19. Immigration petitions are written applications for immigration benefits and are reviewed and processed using the procedures at 5 U.S.C. § 555(f).

20. The evidentiary standard applied to these application and petitions is the "preponderance" standard. See 8 U.S.C. § 1361, 8 C.F.R. § 103.2(b).

21. The Immigration and Nationality Act (INA) of 1990 separates employment-based visas into two categories: nonimmigrant (temporary) and immigrant (permanent, or green card). See 8 U.S.C. §§ 1101(a)(15), 1153 and 1182. Generally speaking each nonimmigrant visa has a corresponding immigrant visa category. See id.

22. Professional workers (requiring a bachelor's, master's degree, or equivalent to such degrees) can temporarily enter and work for a United States employer using an H-1B visa. 8

U.S.C. § 1101(a)(15)(H)(i)(b). The H-1B visa is open to "specialty occupations," a term that is defined at 8 U.S.C. § 1184(i)(1) and (2) as:

> (1) an occupation that requires—
>
> (A) theoretical and practical application of a body of highly specialized knowledge, and
>
> (B) attainment of a bachelor's or higher degree in the specific specialty (or its equivalent) as a minimum for entry into the occupation in the United States.
>
> (2) For purposes of section 1101(a)(15)(H)(i)(b) of this title, the requirements of this paragraph, with respect to a specialty occupation, are—
>
> > (A) full state licensure to practice in the occupation, if such licensure is required to practice in the occupation,
> >
> > (B) completion of the degree described in paragraph (1)(B) for the occupation, or
> >
> > (C)(i) experience in the specialty equivalent to the completion of such degree, and (ii) recognition of expertise in the specialty through progressively responsible positions relating to the specialty.

23. Defendant determined that the statutory definition of specialty occupation and its degree requirement were ambiguous and not sufficiently instructive, and created regulations clarifying the occupation's degree requirement. See Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc., 467 U.S. 837 (1984) (requiring Courts to follow the properly promulgated regulations of an agency when a statute is ambiguous). The regulations at 8 C.F.R. § 214.2(h)(4)(iii)(A) state that:

> To qualify as a specialty occupation, the position must meet one of the following criteria:
>
> > (1) A baccalaureate or higher degree or its equivalent is normally the minimum requirement for entry into the particular position;

> (2) The degree requirement is common to the industry in parallel positions among similar organizations or, in the alternative, an employer may show that its particular position is so complex or unique that it can be performed only by an individual with a degree;
>
> (3) The employer normally requires a degree or its equivalent for the position; or
>
> (4) The nature of the specific duties are so specialized and complex that knowledge required to perform the duties is usually associated with the attainment of a baccalaureate or higher degree.

Emphasis added.

24. By the plain language of the statute, no degree is required to qualify for a specialty occupation. Rather, experience equivalent to the type of work performed by a formally educated professional will suffice.

25. By the plain language of Defendant's own regulations, the touchstone of a "specialty occupation" is an ability to critically think and perform analysis on a level that is expected of a college graduate holding "A baccalaureate or higher degree…" Id. The use of the expansive article "a" in the regulation addresses the ambiguous language in the statute, indicating it is the intellectual ability developed through studies that matters, not the name of the degree, that qualifies a position as a specialty occupation. This is the definition that the Court must defer to. Chevron, 467 U.S. 837, See also Residential Finance Corp. v. USCIS, 839 F. Supp. 2d 985, 996 (S.D. Ohio 2012) (overturning USCIS denial of an H-1B visa on the same grounds as discussed in this case).

26. The regulatory explanation of what qualifies as a specialty occupation, with its expansive degree requirement, is not ambiguous. An employer can satisfy the degree requirement by showing that it is normal, common, or usual for United States workers in the position to hold a degree.

27. However, a recent Freedom of Information Act lawsuit has disclosed that the agency now interprets its regulations in a way that contradicts the plain language. The agency now interprets the requirement for a degree to be necessary, and not normal. See 8 C.F.R. § 214.2(h)(iii)(4)(A)(1).

FIRST CAUSE OF ACTION
(Violation of the Administrative Procedure Act)

28. Federal courts have authority to hear challenges to final agency actions, and hold unlawful actions that are:

> (A) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law;
>
> (B) contrary to constitutional right, power, privilege, or immunity;
>
> (C) in excess of statutory jurisdiction, authority, or limitations, or short of statutory right;
>
> (D) without observance of procedure required by law;
>
> (E) unsupported by substantial evidence in a case subject to sections 556 and 557 of this title or otherwise reviewed on the record of an agency hearing provided by statute…

5 U.S.C. § 706.

29. Agency actions that are not authorized by statute are unlawful. *See United States v. Mead Corp.*, 533 U.S. 218 (2001) (lack of statutory authority to make rules with the force and effect of law led to invalidation of agency regulations). Agency actions that contradict the statute are unlawful. *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 81 L. Ed. 2d 694, 104 S. Ct. 2778 (1984) (When Congress has "explicitly left a gap for an agency to fill, there is an express delegation of authority to the agency to elucidate a specific provision of the statute by regulation," and any ensuing regulation is binding in the courts unless procedurally defective, arbitrary or capricious in substance, or manifestly contrary to the statute).

30. The statute requires Defendant to perform two tasks: determine if the position is a "specialty occupation;" and, determine if the employee has the requisite qualifications for the position described by the employer. 8 U.S.C. § 1184(i).

31. The first step is broken down into two elements. First, does the occupation require theoretical and practical application of a body of highly specialized knowledge. Second, do United States workers employed in the occupation require a degree in a specific specialty. Defendant determined the statutory degree requirement was ambiguous, and created regulations setting standards for how a position qualifies as a specialty occupation. *See* 8 C.F.R. § 214.2(h)(iii)(4)(A).

32. Under 8 C.F.R. § 214.2(h)(iii)(4)(A) an employer satisfies the second elements degree requirement by showing a degree is normally, commonly, or usually required of United States workers doing the job.

33. The agency has unlawfully amended its regulations and interprets 8 C.F.R. § 214.2(h)(iii)(4)(A) in a way that is contrary to the plain language of the regulation. The agency's new interpretation requires employers show that United States workers doing the job necessarily or always have a degree.

34. Plaintiff satisfied the regulatory definition of "specialty occupation," and showed a degree was normally, commonly, or usually required of United States workers. The agency denied the petition because the employer did not prove a specific degree was always required. Defendant's decision violates the APA because it is not in accordance with the statute or properly promulgated regulations. Defendant's decision contradicts the plain and express language of both statute and regulation. *See RELX, Inc. v. Baran*, No. 19-CV-1993, 2019 WL 3557699, at *1 (D.D.C. Aug. 5, 2019)

35. Defendant's decision is arbitrary and capricious because it misstated the law and evidence when evaluating 8 C.F.R. § 214.2(h)(iii)(4)(A)(1)-(4).

36. Defendant's decision is arbitrary and capricious because it rejected DOL's Occupational Outlook Handbook's determination that a degree in computer science or experience equating to a degree is normally required as the minimum for entry into the field. *RELX*, 2019 WL 3557699 at *9

37. Defendant's decision is arbitrary and capricious because it misstated the law and rejected evidence without explanation when evaluating the degree requirement in the industry and complexity of the position under 8 C.F.R. § 214.2(h)(iii)(4)(A)(2). Defendant also appears to have relied upon expert opinion evidence outside the record when making findings on the complexity of the position.

38. Defendant's decision is arbitrary and capricious because it rejects 8 C.F.R. § 214.2(h)(iii)(4)(A)(3) fails to acknowledge or explain why it rejected evidence that Plaintiff hires employees with the requisite degree for these positions.

39. Defendant's decision is arbitrary and capricious because it rejects evidence in the record without a reasoned explanation and failed to consider evidence material to the complexity and knowledge required for the position under 8 C.F.R. § 214.2(h)(iii)(4)(A)(4).

40. Defendant also violated the APA by relying on material evidence outside of the record, and by not affording an opportunity to respond to such evidence. Defendant made statement that could only be supported by someone with expertise in the field. Defendant did not provide notice that they sought or were provided by an expert opinion. Alternatively, the decision is arbitrary and capacious because Defendant does not have a basis for finding the position is not complex and did not require the skills listed on petition.

41. Plaintiff reserves the right to add additional errors upon full review of the administrative record.

PRAYER FOR RELIEF

Wherefore, in view of the above authority, Plaintiff prays for the following relief:

1. Assume jurisdiction over this matter;

2. Hold Defendant's decision is unlawful;

3. Order Defendant to approve the petition;

4. Grant all relief that is necessary and proper;

5. Award attorney's fees under the Equal Access to Justice Act.

October 1, 2019

Respectfully submitted,

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